

2.025

AFFIRMATIVE DEFENSE

The defendant has raised the affirmative defense of [] with respect to the charged offense[s] of []. The burden of proving each element of the offense[s] beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of [] is on the defendant. The defendant must prove the affirmative defense of [] by a preponderance of the evidence. If you find that the defendant has proven the affirmative defense of [] by a preponderance of the evidence you must find the defendant not guilty of the offense[s] of [].

SOURCE: A.R.S. § 13-205 (statutory language as of July 21, 1997)

USE NOTE: Pursuant to legislative enactment in 2006, justification defenses under chapter 4 of A.R.S. Title 13 are not affirmative defenses for crimes occurring on or after April 24, 2006. However for crimes occurring before this date, they remain affirmative defenses. In such cases, the court shall instruct on “affirmative defense” so as to inform the jury on the correct burden of proof. “Affirmative defense” is defined in A.R.S. § 13-205 (Statutory Instruction 2.025). An affirmative defense must be shown by a preponderance of the evidence. “Preponderance of the evidence” is defined in Standard Instruction 5b(2).

The affirmative defense at issue may apply to all charged offenses. The instruction should specify the particular offenses to which it is applicable. Use language in the brackets as appropriate to the facts and charges.

COMMENT: In the vast majority of cases proof of the affirmative defense will require the jurors to acquit the defendant on the applicable charged offense[s]. However, in certain instances proof of the affirmative defense may only reduce the defendant’s legal culpability. In those instances, the final sentence of the instruction should be modified accordingly.

A.R.S. § 13-205 provides that “[e]xcept as otherwise provided by law” the defendant must prove an affirmative defense by a preponderance of the evidence. Currently, the only exception to the preponderance of evidence standard are the affirmative defenses of entrapment and insanity, which must be proven by clear and convincing evidence. See A.R.S. §§ 13–206, –502(c). When the affirmative defenses of entrapment or insanity are raised, this instruction should not be given. The entrapment (2.036) and insanity (5.02) instructions should be given, which include the clear and convincing evidence standard.

This instruction is consistent with the affirmative defense instruction (on self defense) suggested by the court of appeals in *State v. Sierra-Cervantes*, 201 Ariz. 459, 37 P.3d 432 (App. 2001).

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